92-481

No. _____

Supreme Court, U.S.
FILED
SEP 18 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BILLY FRANKLIN WILLIAMS,

Petitioner,

v.

EAGLE-PICHER INDUSTRIES, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not it is a violation of the Fifth and Seventh Amendments to the United States Constitution to prohibit a civil plaintiff because of physical impairment from attending and assisting in his trial.

2. Whether remittitur is a proper remedy where error tainted the amount of a jury verdict, but did not affect the finding of liability.

PARTIES

The following parties appeared below as plaintiffs-appellees

Billy Franklin Williams*

The following parties appeared below as defendants-appellants:

Eagle-Picher Industries, Inc.

Owens-Corning Fiberglas Corporation

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* The case below was a consolidated appeal involving additional plaintiffs-appellees who are not petitioners to this writ.

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IN THE

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OCTOBER TERM, 1992

BILLY FRANKLIN WILLIAMS,

Petitioner,

v.

EAGLE-PICHER INDUSTRIES, INC.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Tenth Circuit Court of Appeals is to be published at 962 F.2d 1492. A copy of the slip opinion has been included in the Appendix to this Petition For a Writ of Certiorari. The decision of the United States District Court for the Northern District of Oklahoma is unpublished, and has also been included within the Appendix to this Petition For a Writ of Certiorari.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

DATES OF JUDGMENTS

The Tenth Circuit Court of Appeals entered its Opinion on May 5, 1992. The Tenth Circuit Court of Appeals issued an Order denying rehearing in this matter on June 22, 1992.

JURISDICTION

This Court has jurisdiction to review the Tenth Circuit Opinion in question by writ of certiorari pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

> No person shall be held to answer for a capital, or otherwise infamous crime, unless when a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common-law.

U.S. Const. amend. VII.

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence shown by a party to be essential to the presentation of the party's cause.

Fed.R.Evid. 615.

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Fed.R.Civ.P. 38(a).

STATEMENT OF THE CASE

On May 5, 1992, a three-member panel of the Tenth Circuit Court of Appeals reversed and remanded this case for trial. Petitioners requested rehearing in this matter at the Tenth Circuit Court of Appeals. This request was denied on June 22, 1992.

The trial court had granted remittitur in this case, stating that the Plaintiff's appearance in court ". . . sowed the seeds for an award so excessive as to shock the judicial conscience and raise the inference of passion and prejudice." (Order Overruling Defendants' Post-Trial Motions – Except Grant of Remittitur). The Tenth Circuit panel, citing *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), stated that the trial court could not cure the inference of passion and prejudice with remittitur. In so holding, the panel has created serious Constitutional repercussions. The Tenth Circuit panel's opinion mandates that passion

and prejudice can never be cured through remittitur and must always require a new trial. This ruling effectively bans Mr. Williams from his own trial since his debilitated physical condition created the inference of passion and prejudice for which there can be no cure except new trial without the presence of the plaintiff.

The trial court below found the damage award to be so excessive as to shock the judicial conscience and raise the inference of passion and prejudice and therefore granted remittitur. There was no finding by the trial court that the error also tainted the finding of liability in this case. The panel reversed and remanded both findings of liability and the amount of damages irrespective of the holding in the *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981). Petitioner Williams has since settled his dispute with Owens-Corning Fiberglas, which is no longer an interested party.

STATEMENT OF JURISDICTION IN THE COURT OF FIRST INSTANCE

At the trial level, federal jurisdiction was based on 28 U.S.C. §1332, diversity of citizenship.

REASONS FOR ALLOWING THE WRIT OF CERTIORARI

1. The Tenth Circuit Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. The Tenth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The opinion rendered by the Tenth Circuit Court of Appeals conflicts with applicable decisions of this Court.

ARGUMENT AND AUTHORITIES

I. A PLAINTIFF HAS A CONSTITUTIONAL RIGHT TO BE PRESENT AT HIS OWN CIVIL TRIAL.

Plaintiffs have a constitutional right to appear in Court by virtue of the Fifth and Seventh Amendments of the United States Constitution. The due process clause of the Fifth Amendment guarantees a party the right to be present at trial as part of the right to obtain a fair trial. *See, Helminksi v. Ayerst Lab.*, 766 F.2d 208, 216-17 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 386, 474 U.S. 981, 88 L.Ed.2d 339; *Arrington v. Robertson*, 114 F.2d 821, 823 (3d Cir. 1940).

This Court has long held that:

> [T]he orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict.

Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81, 63 L.Ed. 853, 39 S.Ct. 435 (1919)(civil case). *See also, Rogers v. United States*, 422 U.S. 35, 45 L.Ed.2d 1, 95 S.Ct. 2091 (1975)(criminal case).

The Tenth Circuit Court of Appeals has followed *Fillippon* in numerous civil and criminal cases. *See, Fina v. United States*, 46 F.2d 643 (10th Cir. 1931); *Acree v. Minolta Corp.*, 748 F.2d 1382 (10th Cir. 1984); *General Motors Corp. v. Walden*, 406 F.2d 606 (10th Cir. 1969); *Parfet v. Kansas City Life Ins. Co.*, 128 F.2d 361 (10th Cir. 1942). As the Tenth Circuit stated in *Fina*:

> "We have no doubt but that it is a constitutional right of one accused of a felony as in this case, to be present at every stage of the trial,

> because the trial by jury mentioned in our Constitution means by a trial by jury according to the rules of the common law."

Fina, 46 F.2d at 644.

Very little authority exists with regard to the right of a party to attend his own trial at common law. However, "Anglo-Saxon trials were held in the open and all freemen had a duty to attend and to participate in the trials." Note, The Right to a Public Trial In Criminal Cases, 41 N.Y.U. L. Rev. 1138, n. 1 (1966). Thus, the common law was biased toward encouraging participation in trials. Common sense tells us that if non-party freemen had a duty to attend trials, the party bringing suit would certainly have a right to attend his own trial.

Just as the Constitution guarantees criminal defendants a jury trial according to the rules of the common law, the Seventh Amendment of the Constitution guarantees a trial by jury according to the rules of the common law to civil plaintiffs:

> "In Suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. Const. Amend. VII. The denial of this right, guaranteed by the Constitution, "is at all times deemed to be prejudicial." *See, Fina*, 46 F.2d at 644.

Excluding the Plaintiff from his own trial goes against all the rules of trial practice. For instance, while witnesses may be excluded from the trial, a natural party may not be excluded from the trial under Fed.R.Evid. 615. The notes of the advisory committee state, "exclusion of persons who are parties would raise serious problems of confrontation and

due process. Under accepted practice they are not subject to exclusion. 6 Wigmore §841." Federal Rules of Evidence, Rule 615, Notes of Advisory Committee.

The Federal Rules of Civil Procedure similarly provide, "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed.R.Civ.P. 38(a).

Mr. Williams desired to be present at the trial of his asbestos case. Mr. Williams' attorneys concurred, not only because Mr. Williams wished to be present, but also because the assistance of the actual party Plaintiff is invaluable in choosing a jury. Mr. Williams' condition deteriorated at the time of trial. When it became apparent that Mr. Williams' health would not permit his attendance at the trial, he voluntarily left the courtroom to seek medical attention. No objection by the Defendants or the Court was raised regarding Mr. Williams' presence in the courtroom.

The trial proceeded to a verdict in favor of the Plaintiff. This verdict was subjected to remittitur by the trial judge, because the Plaintiff's presence at trial contributed to an award "so excessive as to shock the judicial conscience and raise the inference of passion and prejudice." (May 5 Order at 15). Plaintiff accepted the remittitur. Defendants appealed to the Tenth Circuit, which vacated the trial court's judgment and remanded for a new trial.

II. OTHER CIRCUITS HAVE HELD THAT THE CIVIL PLAINTIFF HAS ABSOLUTE RIGHT TO BE PRESENT IN THE COURTROOM TO ASSIST WITH THE TRIAL.

A. The Third Circuit Position.

Under the terms of the panel's Order, the only way that Mr. Williams could have avoided prejudicing the jury would have been by not attending his own trial. The Third Circuit has stated:

> A party to a lawsuit has a right to attend the trial absent an overwhelming reason to the contrary. In a civil case, this court can at this time envision no reason to exclude a party because of his injuries, particularly where, as in this case, the party's behavior at trial was not disruptive.

Marks v. Mobil Oil Corp., 562 F.Supp. 759 (E.D. Pa. 1983), *affirmed*, 727 F.2d 1100 (3d Cir. 1984).

According to the Third Circuit, the right of a party to be present at his own trial is grounded in the Fifth Amendment to the United States Constitution. *Arrington v. Robertson*, 114 F.2d 821, 823 (3d. Cir. 1940). *See also, Snyder v. Lehigh Valley R.R. Co.*, 245 F.2d 112 (3d Cir. 1957).

B. The Sixth Circuit Position.

The case law of the Sixth Circuit indicates that if a party is able to assist counsel in a meaningful way, then the party cannot be involuntarily excluded regardless of prejudicial impact. *Helminski v. Ayerst Lab*, 766 F.2d 208, 218 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 386, 474 U.S. 981, 88 L.Ed.2d 339 (1985). The Sixth Circuit has held that even if the jury would be prejudiced by the appearance of a party in the courtroom, that fundamental standards of fairness and due process require allowing that party to be present in the courtroom during his trial. *Helminski*, 766 F.2d at 218. *See also, In re Bendectin Litigation*, 857 F.2d 290, 324 (6th Cir. 1988).

C. The Positions of Other Courts.

The First Circuit held that the party plaintiff has a right to be present at his own trial where no attempt was made: "To parade a handicapped plaintiff before the jury in a deliberate attempt to elicit sympathy . . . rather, the event was an unanticipated, isolated occurrence." *Gonzalez-Marin v. Equitable Life Assurance*

Society of the United States, 845 F.2d 1140, 1147 (1st Cir. 1988). *See also, Purvis v. Intercounty Telephone & Telegraph Co.,* 203 So.2d 508 (Fla. Ct. App. 1967); *Carlisle v. County of Nassau,* 408 N.Y.S.2d 114, 116-17 (1978)(a party has a fundamental constitutional right to be present at his own jury trial).

III. REMITTITUR WAS A PROPER REMEDY WHERE ERROR TAINTED THE AMOUNT OF THE AWARD BUT DID NOT AFFECT THE FINDING OF LIABILITY.

The trial court in *Williams* granted remittitur in the amount of $600,000. This reduced the $1,200,000 verdict by half. In so doing, the Court stated:

> "The court determines that the $1,200,000 award was so excessive as to shock the judicial conscience and raise and irresistible inference of passion and prejudice on the part of the jury for the reasons hereinafter stated." (Citations omitted).

The panel reversed the trial court and remanded the *Williams* case for new trial stating that "a verdict that is the product of passion and prejudice cannot be cured by remittitur." Citing *Mason v. Texaco, Inc.,* 948 F.2d 1546 (10th Cir. 1991); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith,* 703 F.2d 1152, 1168 (10th Cir. 1981).

In *Malandris,* the Court held that a punitive damage award was excessive. In that case, the Court stated:

> "However, we do not feel that the verdict was a result of passion or prejudice so that the determination of liability is tainted; and since we conclude that there is only error in the size of the punitive award, the remedy of remittitur is appropriate."

Malandris, 703 F.2d at 1168.

In the *Williams* case, the trial court found that the *award* was so excessive as to shock the judicial conscience and raised the *inference* of passion and prejudice. (Order Overruling Defendants' Post-Trial Motions - Except Grant of Remittitur at p. 5). It is clear from this order that the trial court did not find that the liability determination was the result of passion or prejudice and only found error in the excessiveness of the award. In that instance, remittitur is appropriate.

> "If the verdict is the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion not only on the issue of damages, but also on the issue of liability, the trial court must unconditionally order a new trial and cannot give the plaintiff the option to accept a lessor amount."

6A Moore's Federal Practice §59.08[7], at 59-199 (1987).

The trial court in *Williams* was satisfied that the determination of liability was not tainted. The order is very specific and speaks only to the excessiveness of the award and overrules all requests for new trial based upon liability evidence.

The jury answered special verdict forms wherein it found liability against both Defendants based upon manufacturers' products liability and negligence theories. Two other juries returned similar liability verdicts against these two Defendants based upon concurrently presented liability evidence. The trial court refused to reverse the liability findings in any of the three cases. The Tenth Circuit panel, with its remand for a new trial, has held that any finding of passion or prejudice automatically requires a new trial. Citing *Mason* and *Malandris*. However, the language in both these cases supports the trial court's finding that an excessive award may be cured by remittitur when the liability determination is not also tainted.

The Fifth Circuit has analyzed this specific issue and has succinctly stated the rationale for the distinction. That Court in reviewing a determination of an excessive award stated that:

> A jury's finding as to liability can be binding even though its monetary award is found to be excessive or even improperly influenced — our deference to and faith in the jury system demands at least this much. If the passion, prejudice, caprice, undue sympathy, arbitrariness or more taints only the damage award and not the liability assessment, the proper response is a remittitur or a new trial addressed to damages alone.

Edwards v. Sears Roebuck & Co., 512 F.2d 276, 282 (5th Cir. 1975)(citations omitted).

The opinion cites to a footnote wherein the distinction is more fully discussed:

> Professor McCormick noted the distinction we draw here, and pointedly elaborated on it as follows: For passion produced by unfair tactics or argument of the successful party, the threat of an unconditional new trial may well be the only effective preventive. In those cases, however, where the facts themselves are so appealing to the sympathies or prejudices of the average man that any jury is likely to render a swollen verdict, then, if the plaintiff's counsel has not by unfair methods whipped up the natural emotions of the jury, to require another trial seems questionable policy. In these cases, an opportunity to reduce the award as an alternative to a new trial might well be offered to the plaintiff wherever the trial judge is satisfied with the justness of the result on the question of liability. To insist that no verdict stand until the jury gives a

> verdict free of passion and prejudice both in respect to liability, and in respect to amount is in these appealing cases to expect an impossibility.

Edwards, 512 F.2d at 283, n. 8.

The trial court below recognized this distinction by ordering remittitur only as to the award while leaving the finding of liability intact.

The trial court opined that the excessive award raised the *inference* of passion and prejudice. Inference as defined by *Webster's Ninth New Collegiate Dictionary* is 1: to derive as a conclusion from facts or premises 2: guess, surmise. The plain language of the trial court's order stated that the award shocked the judicial conscience so as to require remittitur, however, it did not rise to the level of actual passion and prejudice. The trial court had applied the proper remedy for an excessive damage award. There is nothing in the record to support a finding that the determination of liability in the *Williams* case was tainted. Therefore, the liability finding should be left intact and the excessive verdict may be cured by remittitur.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals For the Tenth Circuit Opinion (May 5, 1992) ..... App. 2

Order Overruling Defendants Post-Trial Motions Except Grant of Remittitur (May 14, 1990) ..... App. 23

United States Court of Appeals For the Tenth Circuit Denial of Petition For Rehearing (June 22, 1992) ..... App. 29

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-5133
JAY WILLIAM BLAIR AND MILDRED L. BLAIR,
Plaintiffs-Appellees,
v.
EAGLE-PICHER INDUSTRIES, INC.,
Defendant-Appellant,
AND
OWENS-CORNING FIBERGLAS CORPORATION,
Defendant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-720-B)

No. 90-5134
BILLY FRANKLIN WILLIAMS,
Plaintiff-Appellee,
v.
EAGLE-PICHER INDUSTRIES, INC.,
Defendant,
AND
OWENS-CORNING FIBERGLAS CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-716-B)

No. 90-5135

BILLY FRANKLIN WILLIAMS,
Plaintiff-Appellee,

v.

EAGLE-PICHER INDUSTRIES, INC.,
Defendant-Appellant,

AND

OWENS-CORNING FIBERGLAS CORPORATION,
Defendant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-716-B)

No. 90-5136

JAY WILLIAM BLAIR AND MILDRED L. BLAIR,
Plaintiffs-Appellees,

v.

EAGLE-PICHER INDUSTRIES, INC.,
Defendant,

AND

OWENS-CORNING FIBERGLAS CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-720-B)

No. 90-5137

FLORA L. POWELL,
Individually, and as Surviving Wife of
HUBERT C. POWELL, Deceased,
Plaintiff-Appellee,

v.

EAGLE-PICHER INDUSTRIES, INC.,
Defendant,

AND

OWENS-CORNING FIBERGLAS CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-555-E)

No. 90-5138

FLORA L. POWELL,
Individually, and as Surviving Wife of
HUBERT C. POWELL, Deceased,
Plaintiff-Appellee,

v.

EAGLE-PICHER INDUSTRIES, INC.,
Defendant-Appellant,

AND

OWENS-CORNING FIBERGLAS CORPORATION,
Defendant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-555-E)

No. 90-5148

JAY WILLIAM BLAIR AND MILDRED L. BLAIR,
Plaintiffs-Appellees,

v.

EAGLE-PICHER INDUSTRIES, INC.,
AND
OWENS-CORNING FIBERGLAS CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-720-B)

No. 90-5149

BILLY FRANKLIN WILLIAMS,
Plaintiff-Appellant,

v.

EAGLE-PICHER INDUSTRIES, INC.,
AND
OWENS-CORNING FIBERGLAS CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-716-B)

No. 90-5150

FLORA L. POWELL,
Individually, and as Surviving Wife of
HUBERT C. POWELL, Deceased,
Plaintiff-Appellant,

v.

EAGLE-PICHER INDUSTRIES, INC.,
AND
OWENS-CORNING FIBERGLAS CORPORATION,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA
(D.C. No. 88-C-555-E)

Harmon S. Graves III of Tilly & Graves, P.C., Denver, Colorado, for Defendants-Appellants/Cross-Appellees (John W. Grund of Tilly & Graves, P.C., Denver, Colorado, on the briefs for Defendant-Appellant/Cross-Appellee Owens-Corning Fiberglas Corporation; Martin J. Murphy of Davis and Young Co., L.P.A., Cleveland, Ohio, on the briefs for Defendant-Appellant/Cross-Appellee Eagle-Picher Industries, Inc.).

John W. Norman (Gina L. Hendryx, with him on the briefs) of Norman & Edem, P.C., Oklahoma City, Oklahoma, for Plaintiffs-Appellees/ Cross-Appellants.

Before ANDERSON and SETH, Circuit Judges, and SAFFELS, District Judge.

SETH, Circuit Judge.

This appeal arises from the trial of three "tire-worker" asbestos cases. Plaintiffs-Appellees sued Eagle-Picher and Owens-Corning claiming lung damage from airborne asbestos fibers from Defendants-Appellants, products. Appellants challenge the denial of their motions for directed verdict and for judgment notwithstanding the verdict on the grounds that Appellees failed to produce evidence of exposure to Appellants, products sufficient to support a verdict against them. Appellants also claim that the district court improperly instructed the jury on the issue of causation. Alternatively, Appellants claim numerous points of error relating to the format and execution of the trial.

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* Honorable Dale E. Saffels, United States Senior District Judge for the District of Kansas, sitting by designation.

Plaintiffs Blair, Williams, and Powell worked in the B.F. Goodrich plant in Miami, Oklahoma for 39, 28, and 27 years, respectively. (Plaintiff Powell was the spouse of the deceased tireworker Hubert Powell. For ease of reference, however, "Plaintiffs" or "Appellees" will refer to the three tireworkers Blair, Williams, and Powell.) The Miami Plant manufactured tires of all kinds from 1946 until its closure in 1986. The manufacture of tires is a hot and dusty Job. Miles of pipe carrying steam and hot liquids ran throughout the forty-acre plant. In order to prevent heat from escaping from the hot pipes, the pipes were insulated with products manufactured by Appellants and others. Some of these products contained varying amounts of asbestos. These asbestos containing products are the subject of this litigation.

Plaintiffs' cases were tried together in an unusual trial format. The trial was divided into common and specific phases. Voir dire for the Williams and Blair juries was conducted contemporaneously in one courtroom and voir dire for the Powell jury was conducted in a separate courtroom along with another case which was subsequently dismissed.

All three juries were joined to hear common opening statements and liability evidence common to all three cases. Testimony from the common phase of the trial was videotaped and simultaneously televised to the juries in the district court's largest courtroom. The juries were then separated to hear case specific opening statements and evidence on causation and damages. Closing arguments were done individually for each case.

By pretrial order, each Plaintiff was allowed seven expert witnesses while Defendants were allowed a collective total of seven expert witnesses in each case. Testimony by experts was given in narrative form and

was limited to thirty minutes. The district court limited cross-examination to forty-five minutes per expert.

In all three cases the juries found for the Plaintiffs. In the Blair case, the jury awarded the Plaintiffs, Jay and Mildred Blair, $300,000 and $50,000, respectively. In Williams, the jury awarded the Plaintiff $1,200,000 and the district court ordered a remittitur of $600,000 thereby reducing the judgment to $600,000. In Powell, the jury awarded the Plaintiff $200,000. Each award was offset by the amount already obtained through settlements with other defendants pursuant to Okla. Stat. Ann. tit. 12, § 832(H)(1).

Sufficiency of the Evidence Under Oklahoma Products Liability Law

Appellants first contend that the district court erred when it refused to grant their motions for directed verdict and for judgment notwithstanding the verdict because Appellees did not bring forth legally sufficient evidence of exposure to Appellants' products. Our review of the denial of the motions for directed verdict and for judgment notwithstanding the verdict is de novo. Transpower Constructors v. Grand River D&M Auth., 905 F.2d 1413, 1416 (10th Cir.). The trial court will be overturned only if "the evidence taken in the light most favorable to the nonmoving party and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party." Id.

In order for a plaintiff in Oklahoma to prevail in a products liability action such as this one, the plaintiff must first prove that the defendant's product actually caused the injury. Kirkland v. General Motors Corp., 521 P.2d 1353, 1363 (Okla.). The mere possibility that the product caused the injury is not enough. Id. In Caso v. Fibreboard, 743 P.2d 1062 (Okla.), the Oklahoma Supreme Court reiterated the requirement of a caus-

ative link between the defective product and the plaintiff's injuries. In answer to a certified question from this court, the Oklahoma Supreme Court rejected the market share liability theory in asbestos cases. Id. at 1067. The Court stated:

> "Although plaintiffs in asbestos related injury cases may not be able in all cases to identify potential defendants, the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries where there is a lack of circumstances which would insure that there was a significant probability that those acts were related to the injury."

Id. Thus, plaintiffs in Oklahoma products liability cases must show that there is a significant probability that the defendant's products caused their injuries.

In Dillon v. Fibreboard, 919 F.2d 1488, 1491 (10th Cir.), this Court approved a three-part analysis of facts under the significant probability standard of Case. The three-part analysis is derived from the Fourth Circuit opinion in Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (10th Cir.), and requires "evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked."

It appears from the record that the trial court strayed from the significant probability standard set forth in Case and Dillon when it announced its own definition of significant probability in Master Order No. 4. Master Order No. 4 addressed Appellants' motions for summary judgment. In denying Appellants' motions the trial court stated, "In terms of the tire-worker cases, a 'significant probability' involves evi-

dence (1) that a defendant's product was present at the plant, and (2) that the plaintiff worked at the plant at the time of installation or some other application of defendant's product. 'Application' contemplates moving or cutting the product such that dust might be produced." Master Order No. 4 at 3. While it is not clear from the record that the standard set out in Master Order No. 4 was the standard followed throughout the trial, it is reasonable to assume that this was also the basis for denying Appellants' motions for directed verdict and for judgment notwithstanding the verdict.

The district court's formulation of significant probability as set out in Master Order No. 4 is erroneous because it does not require the Plaintiff to prove that he was actually exposed to the Defendants' products. This is clearly contrary to Case and Dillon. Appellees argue that the standard enunciated by the district court is the same as that in Dillon. We disagree. In Dillon, we said that plaintiff's burden of proof of causation "would be satisfied by proof that [plaintiff] had sufficient contract with identifiable products manufactured by defendants to cause his lung [condition]." Dillon, 919 F.2d at 1491. The standard used by the district court in Master order No. 4 does not require any contact between the Plaintiffs and the Defendants' products. The trial court wrongly assumed that sufficient contact could be shown by proof that a Defendant's product was somewhere inside a forty-acre facility at the same time as a Plaintiff. To approve the standard adopted by the trial court would be to dilute considerably Oklahoma's significant probability standard.

Applying the significant probability standard from Case and Dillon the court should have granted Appellants' motions for directed verdict and for judgment notwithstanding the verdict in the Powell case because there was insufficient evidence of exposure

to Appellants' products to support a verdict for Powell. In the Williams and Blair cases, however, Appellees produced sufficient evidence to support the district court's denial of the motions.

The evidence in the record taken in the light most favorable to Mr. Powell is not sufficient to avoid a directed verdict or a judgment notwithstanding the verdict. There is no evidence in the record to show that Powell was ever exposed to asbestos from Appellants' products. Mr. Ellis, an insulation applicator at the plant and Plaintiff's main exposure witness, testified that he knew Mr. Powell and that Powell worked in the green tire repair area. Ellis also testified that he stored asbestos containing materials in this area. Ellis specifically testified, however, that he could not recall applying Defendants' materials in the presence of Powell.

> "THE COURT: Is it your testimony that you made no application of any of these products in [Powell's work] area but that you stored some, is that.
>
> THE WITNESS [Ellis]: No I didn't, I didn't—while he was working there in that area, I can't recall ever doing any insulation work where he was working, but I had materials stored in that area, yes, sir."

(Testimony of Bob Ellis Vol. XIV at 15.)

The testimony of Powell's co-worker, Mr. Brown, is similarly unhelpful to Powell. Brown testified that he and Powell worked at similar jobs until Powell's retirement in 1973. His testimony established that workers in the area of the plant where he and Powell worked were exposed to airborne dust. However, Brown further testified that to his knowledge the dust was mostly soapstone, carbon black, ground rubber, and occasionally insulation. This evidence, viewed in the light most favorable to Mr. Powell, is insufficient to

establish a significant probability that the Defendants' products caused his injuries.

Appellants' motions for directed verdict and for judgment notwithstanding the verdict in the Williams and Blair cases were properly denied. Viewing the evidence in the light most favorable to Williams and Blair, we hold that there was sufficient evidence of exposure to Appellants' products to meet Oklahoma's significant probability standard. Appellees' main witness on exposure was Ellis. Ellis testified that he knew both Williams and Blair and that he remembered being around them while he was doing asbestos insulation work. Although Ellis stated that he could not remember with 100% accuracy where he had applied Appellants' products within the plant, he testified that he had used large quantities of Owens-Corning Kaylo and Eagle-Picher "Super 66" cement throughout the plant. Ellis testified that possibly as much as one-half of all the insulation he used in the B.F. Goodrich plant was Owens-Corning Kaylo.

Individually, Mr. Blair testified that he and other workers were exposed to a large amount of dust from Ellis' work. Blair testified that Ellis "could push this scaffold over a machine that some of us worked on and get up there and apply this asbestos to these broken—to these pipes up there; and while he was doing that all the dust and stuff was coming right down on us." (Vol. XX at 60.) Reasonable men, viewing this evidence in the light most favorable to Blair and Williams, could conclude that there was a significant probability that Appellants' products caused their injuries.

Jury Instructions

Appellants' second point on appeal is that the district court erred in its instructions to the jury by instructing the jury on an improper standard of causation. We review jury instructions to "determine

whether the instruction states the governing law and provides the jury with an ample understanding of the relevant issues and the applicable law." Street v. Parham, 929 F.2d 537, 539 (10th Cir.). We will reverse for an error in jury instructions only if the error is determined to have been prejudicial in light of the whole record. United States v. Denny, 939 F.2d 1449, 1454 (10th Cir.).

The jury instructions in question read as follows:

"DIRECT CAUSE

YOU ARE INSTRUCTED THAT A 'DIRECT CAUSE' OF AN INJURY IS THAT CAUSE WHICH IN NATURAL AND CONTINUOUS SEQUENCE CONTRIBUTED TO PRODUCING THE INJURY. IT NEED NOT BE THE ONLY, NOR THE LAST CAUSE. IT IS SUFFICIENT IF IT CONCURS WITH SOME OTHER CAUSE WHICH IN COMBINATION WITH IT, BRINGS ABOUT OR CONTRIBUTES TO THE INJURY."

"CAUSATION

YOU ARE FURTHER INSTRUCTED THAT EVIDENCE THAT A DEFENDANT'S ASBESTOS CONTAINING PRODUCT WAS AT THE B.F. GOODRICH MIAMI TIRE PLANT AT THE SAME TIME AS PLAINTIFF JAY BLAIR IS NOT SUFFICIENT EVIDENCE FROM WHICH YOU MAY FIND THAT PLAINTIFF'S INJURY, IF ANY, WAS DIRECTLY CAUSED BY THAT ASBESTOS CONTAINING PRODUCT. PLAINTIFF JAY BLAIR MUST ESTABLISH THAT A DEFENDANT'S ASBESTOS CONTAINING PRODUCTS WERE PRESENT IN THE PLANT WHERE PLAINTIFF WORKED AND THAT HE INHALED A SUFFICIENT QUANTITY OF SAID PRODUCT, ALONE OR IN COMBINATION WITH OTHER

ASBESTOS CONTAINING PRODUCTS, OVER A SUFFICIENT PERIOD OF TIME TO CAUSE HIS ASBESTOS RELATED INJURY, IF ANY."

Blair Indiv. Trial Vol. I tab 141 at 31-32.) (Note: Similar instructions were given in the Powell and Williams trials.) Appellants claim that the direct cause instruction taken with the causation instruction allowed the jury to find Appellants liable based on any exposure to Appellants' products. We find no merit in this claim. The causation instruction given by the district court specifically stated that in order to prevail, a Plaintiff must prove that he inhaled a sufficient quantity of [Appellants'] product." This precludes a finding of liability based on a possibility of exposure and comports with the significant probability standard of Case.

Further, the Oklahoma Supreme Court has approved jury instructions that are substantially similar to ones in issue here. See Messler v. Simmons Gun Specialties, Inc., 687 P.2d 121, 129 (Okla.); Fields v. Volkswagen of America, Inc., 555 P.2d 48, 57 (Okla.). Under the facts of this case, we hold that the instructions given by the district court were adequate and do not constitute reversible error.

Jury Passion or Prejudice and the Need for a New Trial

Appellants contend that actions taken by Williams' counsel during both the common phase of the trial and during the case specific phase of the trial resulted in jury verdicts in the Blair, Powell, and Williams cases which were tainted by passion and prejudice. Appellants focus on two incidents in particular. First, during the common voir dire in the Williams and Blair trials, Plaintiff Williams was brought into the courtroom in a wheelchair suffering from an unspecified illness. The following excerpt from a later order issued by the trial court outlines the incident.

> "The first day of trial Mr. Williams was brought to the courtroom in an acutely ill condition. The Court described on the record his appearance of being pale, very weak, and bent over in his wheel chair. He literally appeared in a terminal condition. During the voir dire examination of the jury Mr. Williams groaned audibly on numerous occasions interrupting the proceedings. After about thirty minutes to an hour Plaintiff's counsel ushered Plaintiff out of the courtroom where he was taken and admitted to a hospital."

(Appellants' Brief, Appendix D at 4.)

The second incident occurred during the opening argument in the common phase of the trial. Williams' counsel referred to Williams' physical condition during voir dire and stated that the condition was from pneumonia which was a common result of asbestosis.

> "Mr. Williams, who you all saw yesterday in the wheel chair, he cannot be here today. The evidence will be that he had to be hospitalized with pneumonia, which is one of the many complications of asbestosis."

(Vol. VIII at 6.) Appellants' motions for mistrial were denied after each incident. During the remainder of the trial, Williams' counsel introduced no evidence to support the statement he made during his opening regarding Williams' condition. The court never admonished the juries or gave them a jury instruction clarifying the error.

Following the verdicts, Appellants' post-trial motions for judgment notwithstanding the verdict or in the alternative for a new trial were denied in each of the three cases. The court did, however, grant a remittitur in Williams reducing the jury's initial $1.2 million dollar jury verdict by half. The court stated in its order:

> "Plaintiff's appearance in court in an acutely ill condition, coupled with his counsel's misrepresentation in opening statement, and the absence of medical evidence supporting the reason for Plaintiff's current hospitalization, sowed the seeds for an award so excessive as to shock the judicial conscience and raise the inference of passion and prejudice."

We must determine whether the "inference of passion and prejudice" found in the Williams verdict could be cured by a remittitur or warranted a new trial. We also must determine whether the statement in oral argument regarding pneumonia prejudiced the Powell and Blair juries.

We begin with the trial court's grant of remittitur in the Williams case. In Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir.), we recently stated that "[i]t is well settled that mere excessiveness in the amount of an award may be cured by a remittitur, whereas excessiveness which results from jury passion and prejudice may not be so cured. In that case, a new trial is required." Id. at 1561. See also Malandris v. Merrill Lynch, Pierce, Penner & Smith, 703 F.2d 1152, 1168 (10th Cir.).

"The trial court's determination as to whether the verdict is the result of passion or prejudice will not be disturbed on appeal, unless the determination is clearly erroneous." J. Moore, Moore's Federal Practice, 6A ¶ 59.08[7]. Applying the Mason standard to the trial court's findings relative to Williams appears to leave us with but one conclusion; namely, that a new trial is required. In its order the trial court expressly found that the award was "so excessive as to shock the judicial conscience and raise the inference of passion and prejudice." As we noted above, a verdict that is the product of passion and prejudice cannot be cured by remittitur and a new trial is required. Mason, 948 F.2d at 1561. The conclusion that the jury's verdict in

Williams was tainted by passion and prejudice is supported by a careful review of the trial judge's comments with regard to Williams' condition.

The judge stated:

> "[J]ust from a lay standpoint, if [Mr. Williams] is 90 days from today I'll be surprised, I'll be absolutely surprised if he's alive and has a pulse within 90 days from today, from his appearance in this courtroom.
>
> . . . .
>
> I absolutely couldn't believe it when [Williams] entered this courtroom on the day we were picking that jury. Why couldn't I believe it? I thought—I couldn't believe it from a standpoint of just the humanity of it. That man was sick. That guy sitting in this courtroom moaning and groaning carrying on like that, he needed to be in the hospital bad, and I couldn't believe that that man was permitted to be in this courtroom. I was astounded by it, and I'm still astounded by it that you, representing the plaintiff, would permit a man that ill to come into this courtroom. . . . I don't believe I have ever tried a case where I've seen a man that looked as ill and acted as ill as this gentleman right here, and my heart goes out to him."

(Supp. Vol. VIII at 22-23.) It is difficult to imagine that the jury was not affected in the same way as the trial judge. These comments by the judge taken with the size of the verdict in Williams are enough to establish that the verdict was the product of passion and prejudice. Therefore, the entry of remittitur was inappropriate and a new trial should be granted for Defendants in the Williams case.

We next must determine whether Williams' counsel's remarks before the Blair and Powell juries re-

garding Mr. Williams' condition were prejudicial to the Defendants in those cases. It is uncontested that Williams' counsel's statement attributing Mr. Williams' deathly appearance to "pneumonia, which is one of the many complications of asbestosis," was unsupported by the evidence. While it is true that the Blair jury was allowed to see Mr. Williams during voir dire, Appellants have produced no evidence either in the amount of damages awarded in Blair or in the finding of liability to suggest that the verdict was the result of passion and prejudice.

Appellants' claim that Williams' counsel's comment in opening statements prejudiced the Powell jury is even more tenuous. The Powell jury never saw Mr. Williams. Appellants' argument that counsel's statement regarding Mr. Williams' condition being attributable to asbestosis inflamed the jury and led to a verdict that was the result of passion and prejudice is without merit.

Trial Format

Appellants next contend that the format of the trial was fundamentally unfair and prevented them from being able to fully defend the claims against them. Specifically, Appellants argue that the limitation on the number of expert witnesses they were allowed to call substantially prejudiced the presentation of their case. Appellants also argue that the district courts limitation on cross-examination of expert witnesses precluded a fair opportunity for effective cross-examination. Appellant Eagle-Picher claims separately that the presence of video cameras in the courtroom was disruptive and, therefore, violated its right to a fair trial.

We look first at the objections concerning expert witnesses. In a pretrial order the district court collectively limited the number of expert witnesses that the

Defendants could call to seven. The district court also limited cross-examination of experts by either side to forty-five minutes.

It is axiomatic that the trial court has considerable discretion in determining how a trial is to be conducted. Palmer v. Krueger, 897 F.2d 1529, 1538 (10th Cir.); Thweatt v. Ontko, 814 P.2d 1466, 1470 (10th Cir.); Chapman v. United States, 169 F.2d 641, 642-43 (10th Cir.). We have noted previously that "[t]here can be no doubt of the power of the trial court, in the exercise of a sound and reasonable judicial discretion, to limit the number of expert witnesses . . . . " Chapman, 169 P.2d at 642.

At the time the present cases came to trial, the Northern District of Oklahoma had almost 600 asbestos cases on its docket. In light of this enormous case load, we see nothing to suggest that the district court abused its discretion in the conduct of this trial with respect to limits on the number of experts to be called by each side or limits on the amount of time for cross-examination.

Next, we address Eagle-Picher's contention that the presence of video cameras in the courtroom was disruptive, intrusive, and violated its right to a fair trial. This court will not disturb the trial court's conduct of trial proceedings unless "it affirmatively appears from the record that the trial court abused its discretion." C.A. Assoc. v. Dow Chem. Co., 918 F.2d 1485, 1489 (10th Cir.). After a review of the record, we find that the trial court did not abuse its discretion in allowing the trial to be videotaped. Eagle-Picher points to no specific prejudice sustained by it; rather, it only suggests the possibility that jurors may have been distracted by the cameras. It is our impression from reading that the videotaping was not a major distraction during the trial. The trial court commenting on the videotaping procedures said, "I have been impressed with how . . . unobtrusive our videotaping

has been. . . . I think it really hasn't been any kind of an obstruction to us . . . ." (Supp. Vol. IV at 1208-09.) Under these circumstances, we hold that the trial court did not abuse its discretion in allowing the common phase of the trial to be videotaped.

The Allen Instruction in Blair

Appellants also contend that the district court erred in the Allen instruction it gave to the Blair jury. After six hours of deliberation the jury informed the district court that "we cannot come to a complete agreement." (Blair Vol. V at 452.) The court then instructed the jury to recommence deliberations and to make a reasonable effort to arrive at a verdict.

At the outset, we note that Allen instructions are to be used with caution. Reazin v. Blue Cross and Blue Shield, 899 F.2d 951, 978 (10th Cir.). An Allen instruction, however, will not be the basis for reversal or for a new trial unless the instruction was coercive. See United States v. McKinney, 822 F.2d 946, 951 (10th Cir.). Therefore, we must determine whether the instruction given in this case was coercive.

Although the district court mentioned in its instruction the time that the jurors had spent hearing the case and the time that another jury would spend on the case if the jury could not reach agreement, the court also reminded the jurors repeatedly that their continued deliberations must be within the evidence and the law presented to them. Additionally, the court instructed the jurors that they were not to "surrender any honest conviction that you have in the case." (Blair Indiv. Vol. V at 457.) The instruction given by the district court was similar to one that we found to be noncoercive in Reazin, 899 F.2d at 978. See also United States v. Dyba, 554 F.2d 417, 421 (10th Cir.). Thus, we find no merit in Appellants' claim that the Allen instruction was coercive.

Finally, Plaintiffs-Appellees argue on cross-appeal that the district court erred in directing a verdict for Defendants on the issue of punitive damages. After carefully reviewing the record and Plaintiffs' arguments we find no error in the district court's ruling.

Accordingly, the decision of the District Court for the Northern District of Oklahoma in Blair is AFFIRMED, and the decisions in Williams and Powell are REVERSED and REMANDED for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 88-C-716-B

BILLY FRANKLIN WILLIAMS,

Plaintiff,

vs.

EAGLE-PICHER INDUSTRIES, INC.,

AND

OWENS-CORNING FIBERGLAS CORPORATION,

Defendants.

ORDER OVERRULING DEFENDANTS' POST-TRIAL MOTIONS – EXCEPT GRANT OF REMITTITUR

The Court has before it for decision the Post-Trial Motions of Defendant Owens-Corning Fiberglas to Alter or Amend Judgment, or in the Alternative, Motion for Judgment Notwithstanding Verdict, or in the Alternative, Motion for New Trial, and the Motion of Defendant Eagle-Picher Industries, Inc., for New Trial or in the Alternative, for Judgment Notwithstanding the Verdict.[1] The standard for motions for judgment notwithstanding the verdict and new trials is set out in E.E.O.C. v. University of Oklahoma, 774 F.2d 999, 1001 (10th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); Western Plains Service Corp. v. Ponderosa Development Corp., 769 F.2d 654, 656 (10th Cir. 1985); Yazzie v. Sullivent, 561 F.2d 183 (10th Cir. 1977); Holmes v. Wack, 464 F.2d 86, 88-89 (10th Cir. 1972); Wilkins v. Hogan, 425 F.2d 1022, 1024 (10th Cir. 1970); Tidewater Oil Company v. Waller, 302 F.2d 638, 642-643 (10th Cir. 1962); and Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352-353 (4th Cir. 1941).

This case was tried to a jury commencing January 16, 1990, and ending January 29, 1990, requiring ten (10)

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[1] The Court does not consider oral arguments to be necessary; therefore, the request is denied.

actual trial days. Seven (7) days were devoted to common evidence presented with three other Goodrich tireworker asbestos cases and three (3) days were required for the individual evidence phase.

Because the Northern District of Oklahoma has approximately 600 asbestos cases pending (400 tireworker and somewhat under 200 insulation construction worker type cases) the three active judges of the district established a trial protocol that permitted common evidence regarding the history of asbestos and state-of-the-art to be presented to more than one jury and set reasonable time constraints regarding arguments and presentation of expert testimony. For good cause shown the time constraints were often extended. The total number of state-of-the-art and medical witnesses was also reasonably limited[2]. The Court is convinced that the protocol is justified and reasonable in light of the volume of asbestos cases and has assured the parties due process. Fed.R.Civ.P. 42, Fed.R.Evid. 611[3].

The Court has thoroughly reviewed the Defendants' many posttrial assignments of error and finds none with merit, save one. The Court determines that the $1,200,000.00 award was so excessive as to shock the judicial conscience and raise an irresistible inference of passion and prejudice on the part of the jury

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[2] In the pretrial phase the parties listed a total of approximately 200 expert witnesses, asbestos and medical in each case.

[3] The video taping of expert witnesses was employed at the request and approval of Plaintiff and Defendant Owens-Corning to preserve the testimony for future trials. This could potentially save hundreds of thousands of dollars in future trial expense as experts came from across the United States. It was Defendants' preferred two camera video team that was selected to do the taping. Defendant Eagle-Richer's characterization of a "circus like" atmosphere is unfounded hyperbole. The Court concludes the video taping was reasonably unobtrusive and had no adverse effect on the trial or ultimate verdicts.

for the reasons hereafter stated[4]. Whiteley v. OKC Corporation, 719 F.2d 1051, 1058 (10th Cir. 1983); Holmes v. Wack, 464 F.2d 86, 88 (10th Cir. 1972); Garrick v. City and County of Denver, 652 F.2d 969, 971 (10th Cir. 1981); Barnes V. Smith, 305 F.2d 226 (10th Cir. 1962); Hitchcock v. Weddle, 304 F.2d 735 (10th Cir. 1962). Otherwise, fact questions were presented for the jury's determination in keeping with the standards set forth in the Court's Master Order No. 4 and the cases of Case v. Fibreboard Corp., 743 P.2d 1062, 1067 (Okla. 1987), and Lee v. Volkswagen of America, Inc., 688 P.2d 1283 (Okla. 1984).

The evidence established that Plaintiff was retired from Goodrich in 1977 because of severe emphysema resulting from a fifty-year pack tobacco history. The emphysema progressed to the point that Plaintiff was in a wheel chair and could ambulate only a short distance. His shortness of breath markedly limited his activity and resulted in his speech being labored. Plaintiff's medical evidence established there was an asbestosis (restrictive lung disease) overlay to his permanently disabling emphysema (obstructive lung disease).

The first day of trial Mr. Williams was brought to the courtroom in an acutely ill condition. The Court described on the record his appearance of being pale, very weak, and bent over in his wheel chair. He literally appeared in a terminal condition. During the voir dire examination of the jury Mr. Williams groaned audibly on numerous occasions interrupting the pro-

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[4] The Plaintiff's claim for damages of this 72 year old retired tireworker was for his permanent disability and past and future mental pain and suffering and past and future physical pain and suffering arising from his alleged asbestosis. There was no claim for lost wages, impaired earning capacity, or future medical expenses resulting from his alleged asbestosis.

ceedings. After about thirty minutes to an hour Plaintiff's counsel ushered Plaintiff out of the courtroom where he was taken and admitted to a hospital.

In his opening statement Plaintiff's counsel said as follows:

> ". . . and Mr. Williams, who you all saw yesterday in the wheel chair, he cannot be here today. The evidence will be that he had to be hospitalized with pneumonia, which is one of the many complications of asbestosis."

Following Plaintiff's counsel's opening statements Defendants' counsel moved for a mistrial due to inflammatory statements and misrepresentations made by Plaintiff's counsel in opening statement. The Court overruled the motion.

Thus, the jury had seen this acutely ill Plaintiff, moaning audibly, and was told in opening statement by his counsel that his present need for hospitalization was the result of asbestosis complications, and during the trial Plaintiff introduced no evidence in support of this representation. At the end of presentation of evidence, when Defendants' counsel attempted to introduce the hospital record of the current hospitalization, Plaintiff's counsel objected, successfully asserting it had not been exchanged the night before as required by trial protocol. Plaintiff's appearance in court in an acutely ill condition, coupled with his counsel's misrepresentation in opening statement, and the absence of medical evidence supporting the reason for Plaintiff's current hospitalization, sowed the seeds for an award so excessive as to shock the judicial conscience and raise the inference of passion and prejudice. Therefore, a remittitur is hereby GRANTED in the amount of $600,000.00. Within twenty (20) days from the date hereon Plaintiff is directed to file a notice that he accepts the remittitur of the Court, which would result in a final judgment

rendered in favor of the Plaintiff in the amount of $600,000.00, plus proper pre- and post-judgment interest, against the Defendants, or a new trial will be granted Defendants, Eagle-Picher Industries, Inc. and Owens-Corning Fiberglas Corporation, for the reasons aforesaid.

Another assertion of error of Defendants is that the Court denied Defendants the right to offer evidence Plaintiff's present seriously ill condition is related primarily to the existence of colon cancer. The trial court made it abundantly clear that if Mr. Williams' grossly ill appearance was from causes unrelated to asbestos, Defendants would be permitted to present such medical evidence. Defendants had urged throughout that in a case where the Plaintiff had not been diagnosed as having cancer or a probability thereof relating to asbestos exposure, the possibility of future respiratory cancer should not be mentioned by Plaintiff to the jury. The Court agreed and has persisted throughout in this ruling, with strong support of Defendants, and continuing objection of Plaintiff.

The Defendants now erroneously attempt to urge the Court's ruling in this regard denied them the right to inject Plaintiff's colon cancer (unrelated to asbestos) as the principal cause of Plaintiff's ill condition. Such a position cannot be taken in good faith by Defendants because the Court emphatically advised the parties that if medical evidence would support Plaintiff's illness was due to causes unrelated to exposure to asbestos, including cancer, most assuredly Defendants could produce such medical evidence. (Tr. 5-25-89, p. 16; Tr. 1-25-90, pp. 9, 19-20 and 24). Defen-

dants, for strategy reasons, or perhaps lack of supporting medical evidence, chose not to inject nonasbestos related cancer evidence into the case. Defendants' post-trial argument in this regard is incredulous[5].

For the reasons stated above, a remittitur of the $1,200,000.00 judgment in favor of Plaintiff is hereby GRANTED in the amount of $600,000.00. Within twenty (20) days from the date hereon Plaintiff is directed to file a notice that he accepts the remittitur of the Court, which would result in a final judgment in favor of the Plaintiff in the amount of $600,000.00, plus proper pre- and post-judgment interest, against the Defendants or a new trial will be granted Defendants, Eagle-Picher Industries, Inc. and Owens-Corning Fiberglas Corporation.

DATED this day of May, 1990.

THOMAS R. BRETT
United States District Judge

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[5] The Court did not permit Plaintiff's January 19, 1990 hospital record to be received in evidence because Defendants did not advise Plaintiff's counsel the night before of its intended offer, as required throughout the trial protocol. Many times during Plaintiff's case Defendants successfully took advantage of this procedural rule to deny Plaintiff's exhibits, which had not been timely disclosed the evening before. For both trial efficiency and fairness the Court required this evidentiary rule because literally thousands of exhibits were identified pretrial.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-5134

No. 90-5135

BILLY FRANKLIN WILLIAMS,
Plaintiff-Appellee,

v.

EAGLE-PICHER INDUSTRIES, INC.,

AND

OWENS-CORNING FIBERGLAS CORPORATION,
Defendants-Appellants.

ORDER
Filed June 22, 1992

Before McKay, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, SETH, Circuit Judges, and SAFFELS,* District Judge.

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*The Honorable Dale E. Saffels, United States Senior District Judge for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on

rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk